IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 478.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

Brief on Behalf of Plaintiff in Error, in Resistance of Motion to Dismiss or Affirm.

STATEMENT.

This suit is one brought under the provisions of sections 5197 and 5198, R. S. U. S., growing out of the exaction and taking of usurious interest by the defendant bank of and from plaintiff.

Section 5197 provides, in substance, that national banking associations may charge and take interest at the rate allowed by the laws of the State where such bank is located and no more, and in the event the rate of interest is not fixed by the laws of such State, then such bank may charge and take interest at a rate not exceeding seven per centum, and such interest may be taken in advance.

Section 5198 provides, in substance, that the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall work a *forfeiture* of the entire interest which the transaction carries with it or which has been agreed to be paid thereon, and "in case the greater rate of interest has been paid, the person by whom it has been paid, * * * may recover back in action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The plaintiff had divers business transactions with the defendant bank, both as a depositor and borrower of moneys, continuing during the years from about May 27, 1889, until the bank closed its doors, in August, 1896. During these transactions, but without the knowledge or consent of plaintiff, the defendant from time to time, knowingly and unlawfully, reserved and charged a greater rate of interest on moneys borrowed by plaintiff than allowed by the laws of the State of Iowa; all of which usurious and illegal exactions and charges of interest were carried along and continued successively in the transactions, including finally the execution and delivery by plaintiff to the bank of a certain promissory note for $28,000, dated March 1, 1890, payable on or before March 1, 1895, bearing interest at the rate of 8 per centum per annum, payable semi-annually, said interest being represented by ten interest notes, each in the sum of $1,120, payment of said principal and interest notes being secured by a certain mortgage executed and delivered by plaintiff to said bank, covering 3,290.57 acres of land in Plymouth county, Iowa; that the said $28,000 note contained and continued the illegal and usurious interest theretofore exacted and charged plaintiff by defendant bank in the prior transactions, all of which were carried into and became and were part of said final

$28,000 note. Subsequently, and because of default in payment of one of said interest notes, proceedings in foreclosure were instituted, terminating in a judgment against plaintiff on May 6, 1891, in the sum of $31,086.50, and a decree of foreclosure against the lands embraced in said mortgage; that said judgment was, in fact, entered in a sum which was $13,125.40 in excess of the amount actually due at the maturity of said note, on March 1, 1895, excluding therefrom said illegal and usurious interest; that thereafter the said lands were sold to satisfy said judgment, and on or about May 31, 1894, the same were taken possession of by defendant and one White.

That each and every of the several usurious and illegal exactions and charges was and were *knowingly* made by defendant, although plaintiff had no knowledge thereof, and aside from having subsequently discovered that usurious interest had been, in fact, exacted, charged, and taken by the bank (without his knowledge or consent), he was unable to state the exact amount thereof, severally or collectively, or the several dates upon which such charges and exactions had been made, even at the time of filing suit herein, and for the reason that all such information was in the possession and under the control of defendant, and access thereto had been denied him.

PLEADINGS.

Under the foregoing facts plaintiff, on August 29, 1896, gave notice of filing suit for the recovery of moneys provided for in said sections 5197 and 5198 (*R., 3, 4*).

This was followed by the filing of the original petition October 7, 1896 (*R., 4, 5*).

Upon motion of defendant bank, plaintiff was required to state his cause of action for *usury* in one count and his cause of action for balance claimed by him as on *deposit* in another count, and also to state the amount claimed as usury that

was paid within two years next prior to the filing of suit (*R.*, *8*).

Thereafter plaintiff filed an amended petition in three counts, the first and second of which related to the charge of *usury* and the third to the balance claimed as on *deposit* (*R.*, *9*, *20*). Count three will be omitted from the discussion herein.

To the said first and second counts demurrer was interposed by defendant, alleging, substantially, that the same did not state a cause of action coming within the provisions of said sections of the Revised Statutes, and, further, that the action is barred by the limitation prescribed in said section 5198 (*R.*, *20*, *21*).

The demurrer was sustained January 4, 1898 (*R.*, *21*), and final judgment entered dismissing said amended petition and cause of action September 29, 1898 (*R.*, *22*).

On appeal to the supreme court of the State said judgment was *affirmed* May 22, 1900 (*R.*, *32*, *33*).

BRIEF.

As will appear from the opinion rendered in the supreme court of Iowa (*R.*, *32*), the judgment of affirmance in that court, sustaining the dismissal of the plaintiff's cause of action, is based upon a finding by the court that the plaintiff's cause of action was barred by the special statute of limitations contained in section 5198.

The amended petition filed by the plaintiff set forth a cause of action under sections 5197 and 5198 of the Revised Statutes of the United States with such particularity and detail as was possible under the facts shown in said petition, namely, that the defendant bank had, from time to time, knowingly and willfully exacted, charged, and taken usurious interest within the prohibition contained in said sections of the Revised Statutes; that the same had been done

without plaintiff's knowledge, and that the several and respective amounts thereof, as well as the several dates upon which such illegal exactions and charges had been made and taken, appeared in the accounts, books, papers, and records of the defendant bank showing such transactions, all of which were in the custody and possession of defendant, and to which plaintiff had not been permitted to have access.

In other words, under the allegations of the amended petition, the case presented was one where it was alleged that, in a series of transactions, the defendant bank had knowingly exacted, charged, and taken usurious interest, within the prohibition of the sections aforesaid; that the plaintiff had been kept in ignorance thereof, and thereafter, having ascertained that such illegal and usurious exactions had been made, suit was filed, as expressly authorized by law, although even at that time plaintiff did not have knowledge of the exact amount of such illegal charges or the respective dates upon which the same had been made, and that that information was kept from him by the defendant. To that petition a demurrer was interposed by the defendant, based substantially upon an averment that the facts stated did not constitute a cause of action; and, further, that the cause of action, if any, was barred by the statute of limitations provided for in section 5198. The record herein discloses that the case was decided upon the question of the statute of limitations.

The effect of such demurrer is that the bank admitted that it had knowingly charged, exacted, and taken during the years usurious interest, within the prohibition of the statute; that the plaintiff had no knowledge thereof at the time the several transactions occurred, and that all such information and knowledge had been kept from plaintiff by defendant, not only at the time of such several transactions, but also even up to and including the time of filing suit, including as well a denial to plaintiff of access to the books, accounts,

and records of the bank containing such transactions between it and plaintiff; all of which admissions the bank sought to overcome by the bare allegation that, because more than two years had elapsed between the date of the last alleged usurious transaction and the time of filing suit, therefore the cause of action was barred. This view was concurred in by the trial and appellate courts, and the cause of action accordingly dismissed. It is submitted that in this the court erred.

It is to be borne in mind that the right asserted by plaintiff was one secured to him by the provisions of Federal law, and attached to such law was a special statute of limitations; so that, in deciding the present case, the court, while at least tacitly admitting the statement of a good cause of action under such Federal law, proceeded to interpret the statute of limitations contained in the same law which created the cause of action, and held that such statute of limitation barred the remedy. Hence it follows that the court did not merely find a fact which, in and of itself, was sufficient to overcome plaintiff's right of recovery (as claimed in the briefs filed in support of the motion to dismiss or affirm herein), but it has undertaken to interpret the scope, meaning, and effect to be given a certain special statute of limitations attached to and made a part of the very law which created the cause of action and afforded the remedy.

Under the facts stated in the pleadings the transactions between plaintiff and defendant, tainted with usury, continued during the years, terminating in a certain promissory note for $28,000, dated March 1, 1890, and maturing on or before March 1, 1895. The payment of this note was secured by a real-estate mortgage, under which foreclosure proceedings were subsequently had, and judgment in foreclosure entered, resulting in a sale of the lands and the taking possession thereof by the bank on or about May 31, 1894.

It may be here remarked that this foreclosure was had not

because of any default in the payment of the principal indebtedness, but because of default only in the payment of interest on the principal indebtedness, and this notwithstanding the fact that under the provisions of said section 5197 all interest became and was *forfeited* because tainted with usury, and hence not only could not be recovered in suit, but likewise could not create a default in payment for the purposes of foreclosure.

The court below evidently treated the date of the payment of the usurious interest as having been made, in contemplation of law, at least on or before, but not after, said date when possession of the said lands was so taken, and that inasmuch as suit was not instituted until more than two years thereafter, the cause of action was then barred.

There can be no doubt under the decided cases that, under the allegations of the petition, a good cause of action was stated, and that, notwithstanding the usurious interest may be included, continued, and carried into successive renewal notes, the obligation to sue for the recovery of the penalties provided by said section 5198 does not arise until the actual *payment* of the usurious interest, in whatever form that payment may be made or enforced, and that then for the first time the statute of limitations of two years commences to run (Brown *vs.* Marion National Bank, *169 U. S., 416*). It may be conceded, for the purposes of the present case, that if the plaintiff had had knowledge of the fact that the bank had made this illegal exaction and charge of usurious interest at the time of the transaction or at the time when the same was collected from him by the bank by the taking of plaintiff's lands under said foreclosure proceedings on or about May 31, 1894, the statute would have commenced to run from that time, and in that case it would have been incumbent upon him to have brought suit within two years from that date, but while the bank had knowingly made these illegal exactions and charges, knowledge thereof had

been kept by it from the plaintiff, and hence it was not incumbent upon him to sue until he actually discovered what had been so concealed from him, namely, the usurious character of the transactions, from which time only the statute of limitations could run against him.

This is a familiar exception, which, it would seem from an examination of the authorities, the courts have uniformly attached to statutes of limitation, even though such exception be not specially provided for in the statute itself, namely, that where a cause of action has been fraudulently concealed by the defendant the statute will not run until the discovery of the wrong. This has been so repeatedly held by this court that citation of authority in respect of the rule is deemed unnecessary.

This court has also attached to section 5057 of the Revised Statutes (which section contained a statute of limitation of two years in respect of certain litigation between assignees in bankruptcy and persons claiming adversely) a qualification that fraudulent concealment would prevent the running of the statute until the discovery of the fraud (Pearsall *vs.* Smith, *149 U. S., 236*).

It would seem, therefore, that plaintiff not only stated a good cause of action against the bank, under sections 5197 and 5198, but he also pleaded such concealment as removed from his case the bar of the statute of limitations provided for in the section. Notwithstanding this, however, the court followed what would seem to be the unusual course of dismissing a case upon demurrer because of the supposed bar of the statute of limitations disclosed in the petition, and placed its own interpretation upon section 5198 by declining to attach to that section the qualification which this court has attached to all other similar statutes of limitation, namely, that in cases of fraudulent concealment such statutes do not begin to run until the discovery of the fraud.

Under this state of facts and decisions it is submitted that

the court below did not dispose of this case on a mere finding of fact, but that it interpreted section 5198 in respect of the statute of limitations; that its interpretation is erroneous, and that the judgment of dismissal herein was a denial to plaintiff of a right secured to him by said section 5198 of the Revised Statutes.

Respectfully submitted.

JEREMIAH M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., *January* 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 190.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE SIOUX NATIONAL BANK OF SIOUX CITY, IOWA.

Brief on Behalf of Plaintiff in Error.

STATEMENT.

This suit is one brought under the provisions of sections 5197 and 5198, R. S. U. S., growing out of the exaction and taking of usurious interest by the defendant bank of and from plaintiff.

Section 5197 provides, in substance, that national banking associations may charge and take interest at the rate allowed by the laws of the State where such bank is located and no more, and in the event the rate of interest is not fixed by the laws of such State, then such bank may charge and take interest at a rate not exceeding seven per centum, and such interest may be taken in advance.

Section 5198 provides, in substance, that the taking, re-

ceiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall work a *forfeiture* of the entire interest which the transaction carries with it or which has been agreed to be paid thereon, and "in case the greater rate of interest has been paid, the person by whom it has been paid, * * * may recover back in action, in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The plaintiff had divers business transactions with the defendant bank, both as a depositor and borrower of moneys, continuing during the years from about May 27, 1889, until the bank closed its doors, in August, 1896. During these transactions, but without the knowledge or consent of plaintiff, the defendant from time to time, knowingly and unlawfully, reserved and charged a greater rate of interest on moneys borrowed by plaintiff than allowed by the laws of the State of Iowa; all of which usurious and illegal exactions and charges of interest were carried along and continued successively in the transactions, including finally the execution and delivery by plaintiff to the bank of a certain promissory note for $28,000, dated March 1, 1890, payable on or before March 1, 1895, bearing interest at the rate of 8 per centum per annum, payable semi-annually, said interest being represented by ten interest notes, each in the sum of $1,120, payment of said principal and interest notes being secured by a certain mortgage executed and delivered by plaintiff to said bank, covering 3,290.57 acres of land in Plymouth county, Iowa; that the said $28,000 note contained and continued the illegal and usurious interest theretofore exacted and charged plaintiff by defendant bank in the prior transactions, all of which were carried into and became and were part of said final $28,000 note. Subsequently, and because of default in pay-

ment of one of said interest notes, proceedings in foreclosure were instituted, terminating in a judgment against plaintiff on May 6, 1891, in the sum of $31,086.50, and a decree of foreclosure against the lands embraced in said mortgage; that said judgment was, in fact, entered in a sum which was $13,125.40 in excess of the amount actually due at the maturity of said note, on March 1, 1895, excluding therefrom all interest; that thereafter the said lands were sold to satisfy said judgment, and on or about May 31, 1894, the same were taken possession of by defendant and one White.

That each and every of the several usurious and illegal exactions and charges was and were *knowingly* made by defendant, although plaintiff had no knowledge thereof, and aside from having subsequently discovered that usurious interest had been, in fact, exacted, charged, and taken by the bank (without his knowledge or consent), he was unable to state the exact amount thereof, severally or collectively, or the several dates upon which such charges and exactions had been made, even at the time of filing suit herein, and for the reason that all such information was in the possession and under the control of defendant, and access thereto had been denied him.

PLEADINGS.

Under the foregoing facts plaintiff, on August 29, 1896, gave notice of filing suit for the recovery of moneys provided for in said sections 5197 and 5198 (*R., 3, 4*).

This was followed by the filing of the original petition October 7, 1896 (*R., 4, 5*).

Upon motion of defendant bank, plaintiff was required to state his cause of action for *usury* in one count and his cause of action for balance claimed by him as on *deposit* in another count, and also to state the amount claimed as usury that was paid within two years next prior to the filing of suit (*R., 8*).

Thereafter plaintiff filed an amended petition in three counts, the first and second of which related to the charge of *usury* and the third to the balance claimed as on *deposit* (*R.*, *9*, *20*). Count three will be omitted from the discussion herein.

To the said first and second counts demurrer was interposed by defendant, alleging, substantially, that the same did not state a cause of action coming within the provisions of said sections of the Revised Statutes, and, further, that the action is barred by the limitation prescribed in said section 5198 (*R.*, *20*, *21*).

The demurrer was sustained January 4, 1898 (*R.*, *21*), and final judgment entered dismissing said amended petition and cause of action September 29, 1898 (*R.*, *22*).

On appeal to the supreme court of the State said judgment was *affirmed* May 22, 1900 (*R.*, *32*, *33*).

Thereupon the cause was brought to this court by writ of error (*R.*, *35*, *36*).

BRIEF.

As will appear from the opinion rendered in the supreme court of Iowa (*R.*, *32*), the judgment of affirmance in that court, sustaining the dismissal of the plaintiff's cause of action, is based upon a finding by the court that the plaintiff's cause of action was barred by the special statute of limitations contained in section 5198.

The amended petition filed by the plaintiff set forth a cause of action under sections 5197 and 5198 of the Revised Statutes of the United States with such particularity and detail as was possible under the facts shown in said petition, namely, that the defendant bank had from time to time knowingly and willfully exacted, charged, and taken usurious interest within the prohibition contained in said sections of the Revised Statutes; that the same had been done without plaintiff's knowledge, and that the several and re-

spective amounts thereof, as well as the several dates upon which such illegal exactions and charges had been made and taken, appeared in the accounts, books, papers, and records of the defendant bank showing such transactions, all of which were in the custody and possession of defendant, and to which plaintiff had not been permitted to have access (*R., 9, 20*).

In other words, under the allegations of the amended petition, the case presented was one where it was alleged that, in a series of transactions, the defendant bank had knowingly exacted, charged, and taken usurious interest, within the prohibition of the sections aforesaid; that the plaintiff had been kept in ignorance thereof, and thereafter, having ascertained that such illegal and usurious exactions had been made, suit was filed, as expressly authorized by law, although even at that time plaintiff did not have knowledge of the exact amount of such illegal charges or the respective dates upon which the same had been made, and that that information was kept from him by the defendant. To that petition a demurrer was interposed by the defendant, based substantially upon an averment that the facts stated did not constitute a cause of action; and, further, that the cause of action, if any, was barred by the statute of limitations provided for in section 5198. The record herein discloses that the case was decided upon the question of the statute of limitations.

The effect of such demurrer is that the bank admitted that it had knowingly charged, exacted, and taken during the years usurious interest, within the prohibition of the statute; that the plaintiff had no knowledge thereof at the time the several transactions occurred, and that all such information and knowledge had been kept from plaintiff by defendant, not only at the time of such several transactions, but also even up to and including the time of filing suit, including as well a denial to plaintiff of access to the books, accounts, and records of the bank containing such transactions be-

tween it and plaintiff; all of which admissions the bank sought to overcome by the bare allegation that, because more than two years had elapsed between the date of the last alleged usurious transaction and the time of filing suit, therefore the cause of action was barred. This view was concurred in by the trial and appellate courts, and the cause of action accordingly dismissed. It is submitted that in this the court erred.

It is to be borne in mind that the right asserted by plaintiff was one secured to him by the provisions of Federal law, and attached to such law was a special statute of limitations; so that, in deciding the present case, the court, while at least tacitly admitting the statement of a good cause of action under such Federal law, proceeded to interpret the statute of limitations contained in the same law which created the cause of action, and held that such statute of limitation barred the remedy. Hence it follows that the court did not merely find a fact which, in and of itself, was sufficient to overcome plaintiff's right of recovery, but it has undertaken to interpret the scope, meaning, and effect to be given a certain special statute of limitations attached to and made a part of the very law which created the cause of action and afforded the remedy.

Under the facts stated in the pleadings the transactions between plaintiff and defendant, tainted with usury, continued during the years, terminating in a certain promissory note for $28,000, dated March 1, 1890, and maturing on or before March 1, 1895. The payment of this note was secured by a real-estate mortgage, under which foreclosure proceedings were subsequently had, and judgment in foreclosure entered, resulting in a sale of the lands and the taking possession thereof by the bank on or about May 31, 1894.

It may be here remarked that this foreclosure was had not because of any default in the payment of the principal indebtedness, but because of default only in the payment of

interest on the principal indebtedness, and this notwithstanding the fact that under the provisions of said section 5197 all interest became and was *forfeited* because tainted with usury, and hence not only could not be recovered in suit, but likewise could not create a default in payment for the purposes of foreclosure.

The court below evidently treated the payment of the usurious interest as having been made, in contemplation of law, at least on or before, but not after, said date when possession of the said lands was so taken, and that inasmuch as suit was not instituted until more than two years thereafter, the cause of action was then barred.

There can be no doubt under the decided cases that, under the allegations of the petition, a good cause of action was stated, and that, notwithstanding the usurious interest may be included, continued, and carried into successive renewal notes, the obligation to sue for the recovery of the penalties provided by said section 5198 does not arise until the actual *payment* of the usurious interest, in whatever form that payment may be made or enforced, and that then for the first time the statute of limitations of two years commences to run (Brown *vs.* Marion National Bank, *169 U. S., 416*). It may be conceded, for the purposes of the present case, that if the plaintiff had had knowledge of the fact that the bank had made this illegal exaction and charge of usurious interest at the time of the transaction or at the time when the same was collected from him by the bank by the taking of plaintiff's lands under said foreclosure proceedings on or about May 31, 1894, the statute would have commenced to run from that time, and in that case it would have been incumbent upon him to have brought suit within two years from that date, but while the bank had knowingly made these illegal exactions and charges, knowledge thereof had been kept by it from the plaintiff, and hence it was not incumbent upon him to sue until he actually discovered what had been so concealed from him, namely, the usurious char-

acter of the transactions, and the actual collection of such usurious interest from him, from which time only the statute of limitations could run against him.

This is a familiar exception, which, it would seem from an examination of the authorities, the courts have uniformly attached to statutes of limitation, even though such exception be not specially provided for in the statute itself, namely, that where a cause of action has been fraudulently concealed by the defendant the statute will not run until the discovery of the wrong. This has been so repeatedly held by this court that citation of authority in respect of the rule seems almost unnecessary.

This court has also attached to section 5057 of the Revised Statutes (which section contained a statute of limitation of two years in respect of certain litigation between assignees in bankruptcy and persons claiming adversely) a qualification that fraudulent concealment would prevent the running of the statute until the discovery of the fraud (Pearsall *vs.* Smith, *149 U. S., 236*).

See also to the same effect the following:

Bank of U. S. *vs.* Moss, *6 How., 37.*
Page *vs.* Bank of Alexandria, *7 Wheat., 35.*
Penn *vs.* Flack, *3 G. & J., 369.*
Lewis *vs.* Kramer, *3 Md., 265.*
Hopkins *vs.* Kent, *17 Id., 113, 120.*
Stone *vs.* Lawrence, *4 Cranch* (*C. C.*), *11.*
Randon *vs.* Toby, *11 How., 521.*
Moses *vs.* Taylor, *6 Mackey D. C., 255, 281.*

It would seem, therefore, that plaintiff not only stated a good cause of action against the bank, under sections 5197 and 5198, but he also pleaded such concealment as removed from his case the bar of the statute of limitations provided for in the section. Notwithstanding this, however, the court followed what would seem to be the unusual course of dismissing a case upon demurrer because of the supposed bar of the statute of limitations disclosed in the petition, and

placed its own interpretation upon section 5198 by declining to attach to that section the qualification which this court has attached to all other similar statutes of limitation, namely, that in cases of fraudulent concealment such statutes do not begin to run until the discovery of the fraud.

Under this state of facts and decisions it is submitted that the court below did not dispose of this case on a mere finding of fact, but that it interpreted section 5198 in respect of the statute of limitations; that its interpretation is erroneous; that the judgment of dismissal herein was a denial to plaintiff of a right secured to him by said section 5198 of the Revised Statutes, and that the same should be *reversed.*

Counsel for defendant herein contend that no Federal question is involved in the decision here sought to be reviewed. This same objection was before reached in a motion to dismiss or affirm, in resistance of which counsel for plaintiff filed printed brief; and to which printed brief counsel respectfully ask the attention of the court.

In conclusion, counsel respectfully call the attention of the court to the fact that by order of the court this case is to be heard immediately following case No. 164, in both of which cases is involved section 5198 of the Revised Statutes of the United States, as well as its proper application to the transactions covered in this and said other case, the plaintiff in error being the same in each. In that case, No. 164, counsel have filed an extended brief, in which will be found set forth at some length the various decisions of this court bearing upon the questions of law arising under said section 5198, as well as the rule of decision thereunder. Counsel therefore respectfully ask that in connection with the present case, the court will consider the printed brief so filed in said other case, No. 164.

JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., *January*, 1902.